1996

State of Utah v. Scott Logan Gollaher : Brief of Appellant

Utah Court of Appeals

Christine F. Soltis; Assistant Attorney General; Attorney for Plaintiff/Appellee.
Brent D. Ward; James K. Tracy; Parry Lawrence and Ward; Attorneys for Defendant/Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. SCOTT LOGAN GOLLAHER, Defendant/Appellant.	Case No. 960618-CA Priority No. 2

BRIEF OF APPELLANT SCOTT LOGAN GOLLAHER

APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT, DIVISION I, JUDGE TIMOTHY R. HANSON

CHRISTINE F. SOLTIS
Assistant Attorney General
124 State Capital
Salt Lake City, UT 84114
Telephone: (801) 366-0180
Attorney for Plaintiff/Appellee

BRENT D. WARD (#3377)
JAMES K. TRACY (#6668)
PARRY LAWRENCE & WARD
1270 Eagle Gate Tower
60 East South Temple
Salt Lake City, UT 84111
Telephone: (801) 521-3434
Attorneys for Defendant/Appellant

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. SCOTT LOGAN GOLLAHER, Defendant/Appellant.	Case No. 960618-CA Priority No. 2

BRIEF OF APPELLANT SCOTT LOGAN GOLLAHER

APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT, DIVISION I, JUDGE TIMOTHY R. HANSON

CHRISTINE F. SOLTIS
Assistant Attorney General
124 State Capital
Salt Lake City, UT 84114
Telephone: (801) 366-0180
Attorney for Plaintiff/Appellee

BRENT D. WARD (#3377)
JAMES K. TRACY (#6668)
PARRY LAWRENCE & WARD
1270 Eagle Gate Tower
60 East South Temple
Salt Lake City, UT 84111
Telephone: (801) 521-3434
Attorneys for Defendant/Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF JURISDICTION

The Court of Appeals has appellate jurisdiction to decide this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e).

ISSUES PRESENTED FOR REVIEW

1. Did the District Court commit plain error by allowing extensive testimony regarding a subsequent bad act consisting of an alleged incident in a hot tub that was the subject of a count that was dismissed at the preliminary hearing, in violation of Rule 404(b) and Rule 403 of the Utah Rules of Evidence without making any findings that (1) there was a necessity for evidence of the subsequent act, (2) the subsequent act was highly probative of a material issue of the crime charged, and (3) its special probativeness and the necessity for it outweighed its prejudicial effect? Under the plain error standard, the appellate court will reverse if an error exists, the error should have been obvious to the trial court, and the error is harmful. State v. Dunn, 850 P.2d 1201, 1208 (Utah 1993). An appellate court will examine a trial court's decision under Rule 404(b) with very limited deference, according it a relatively small degree of discretion. State v. Doporto, 935 P.2d 484, 489 (Utah 1997). There is no reference in the record of any objection to the introduction of the subsequent bad act evidence.

2. Was the defendant deprived of his Sixth Amendment right to effective assistance of counsel by reason of his attorney's failure to investigate and present evidence of a transcript of a television program that Sarah Call watched that prompted her disclosure of the alleged abuse? This issue was raised below in a post-trial motion that was denied by the trial court. (R. 505-649, 1824). A court will reverse for ineffective assistance of counsel where the defendant can show that counsel's performance was deficient and that the deficient performance prejudiced the defense. State v. Templin, 805 P.2d 182, 186 (Utah 1990) (citing

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984)). In a situation where the trial court has previously heard a motion based on ineffective assistance of counsel, the reviewing court is free to make an independent determination of the trial court's conclusions. However, the factual findings of the trial court shall not be set aside on appeal unless clearly erroneous. Templin, 805 P.2d at 186.

3. Was there prosecutorial misconduct by the state in its closing argument by arguing matters not in evidence or contradicted by the evidence and by referring to the fact that the defendant failed to call his son as a witness? An appellate court will reverse for prosecutorial misconduct if the actions or remarks of the prosecutor call the jury's attention to a matter it would not be justified in considering in determining its verdict and under the circumstances of the case, the error is substantial and prejudicial such that there is a reasonable likelihood that, in its absence, there would have been a more favorable result. State v. Tenney, 913 P.2d 750, 754-55 (Utah Ct. App.) (citations omitted), cert. denied, 923 P.2d 693 (Utah 1996). Defendant's counsel objected to a reference to the consistency of Sarah's testimony with a videotape that was not in evidence (R. 1325-26) and to the reference to the failure of the defendant to call his son as a witness (R. 1361). There is no record of any objection to the misstatement of evidence by the prosecutor. However, these remarks may be reviewed by the appellate court despite the lack of objection under the plain error standard. State v. Palmer, 860 P.2d 339, 342 (Utah Ct. App.), cert. denied, 868 P.2d 95 (Utah 1993).

4. Was the defendant deprived of his Sixth Amendment right to effective assistance of counsel by reason of his attorney's failure to object to the improper remarks of the prosecutor during closing argument and to the introduction of evidence of the subsequent hot tub incident? This issue was not raised before the trial court. The appellate court will consider a claim of ineffective assistance of counsel claim raised for the first time on direct

appeal. State v. Tennyson, 850 P.2d 461, 466 (Utah Ct. App. 1993). In so doing, the appellate court must decide whether defendant was deprived of the effective assistance of counsel as a matter of law, applying the Strickland standard set forth above. Id.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES

Rule 404, Utah Rules of Evidence: Character evidence not admissible to prove conduct, exceptions; other crimes

> (b) Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 403, Utah Rules of Evidence: Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from a conviction in the Third Judicial District Court of Salt Lake County in which a jury found the defendant guilty of sexual abuse of a child, a second-degree felony. Defendant was sentenced to an indeterminate term of not less than one but not to exceed fifteen years in the Utah State Prison. Defendant is presently incarcerated.

B. Course of Proceedings and Disposition in the Trial Court

On or about April 15, 1994, the Defendant/Appellant Scott Logan Gollaher (sometimes referred to as "Gollaher") was charged by Information with three counts of sexual abuse of a child, in violation of U.C.A. § 75-5-404.1. (R. 13). Count I consisted of an allegation that Gollaher had touched Sarah Call in the genital area while she was sleeping on a

trampoline during July 1993. (R. 13). Count II consisted of an allegation that Gollaher had touched Sarah Call in the genital area with his foot while she was in a hut tub on December 31, 1993. (R. 13-14). Count III consisted of an allegation that Gollaher had touched Amy Call in the genital area in June 1993. (R. 14).

On June 23, 1995, a preliminary hearing was held. (R. 731). After the preliminary hearing, the District Court dismissed Count II. (R. 72). A trial by jury was held on February 21-23, 1996. On February 23, 1996, the jury found Gollaher guilty of the first count with regard to Sarah Call and the trampoline incident. (R. 1378). The jury found Gollaher not guilty with regard to the remaining count involving Amy Call. (Id.).

Gollaher's trial counsel subsequently filed a motion for a new trial based on newly discovered evidence, arguing that trial counsel had just discovered the transcript of the television program that Sarah Call watched that prompted the disclosure of the touching, which transcript was strikingly similar to Sarah Call's trial testimony in many important respects. (R. 253-306). Gollaher's trial counsel subsequently withdrew and Gollaher retained new counsel to represent him in the case. (R. 307-313). Gollaher's new counsel determined that the transcript could and should have been discovered by trial counsel prior to trial and that trial counsel had simply not conducted any investigation to obtain the transcript. (R. 510). Therefore new counsel moved to withdraw the motion for a new trial based on newly discovered evidence and to replace it with a motion for a new trial based on insufficiency of counsel. (R. 502-03, 505-649). The motion for a new trial based on insufficiency of counsel was also based on trial counsel's failure to properly investigate evidence of witness suggestibility and post-event memory contamination prior to trial. (R. 505-649). Gollaher also filed a motion to arrest judgment. (R. 505-649). The District Court denied both the

motion to arrest judgment and the motion for a new trial based on insufficiency of counsel. (R. 701, 1824, 1904).

On August 15, 1996, the Court imposed sentence of one to fifteen years. (R. 1889).

STATEMENT OF FACTS

The issues in this appeal require an evaluation of the harmfulness of the legal errors and ineffective assistance of counsel occurring during the trial of this matter. An evaluation of "harmfulness" requires a basic knowledge of the weakness of the prosecution's case and the effect that the erroneous admission of bad act evidence, the misconduct of the prosecutor during closing argument, and the ineffective assistance of counsel, could have had on the jury's verdict.

PROSECUTION'S CASE

Sarah Call was the prosecution's only witness to the incident that was the subject of the conviction. (R. 864-1157). There was a total absence of any physical proof that the offense occurred. (R. 864-1157). The prosecution's entire proof consisted of 13 year-old Sarah Call's testimony about an event that lasted for a few seconds on a trampoline when she was 10 years old and while she was coming out of a state of sleep. (R. 864-1157, 764, 895-96, 937).

WITNESS--SARAH CALL (Direct): *Sarah Call testified that she had gone to* Gollaher's house in the summer of 1993 to sleep over so that she could babysit Gollaher's son Peter the next morning, as Gollaher was to leave the house early that next morning and Gollaher's wife was out of town. (R. 921-24).

Arrangements were made for Sarah Call, Peter Gollaher, and Scott Gollaher to sleep outside on the trampoline. (R. 925-26). Sarah Call had slept outside on the Gollaher's trampoline before. (R. 925).

Sarah Call put on a t-shirt for pajamas. (R. 926-27). Gollaher asked Sarah Call if she wanted to go to the hot tub. Sarah said yes. Sarah thought that Peter was asleep at the time. (R. 929). Gollaher playfully threw Sarah into the hot tub. (R. 930). Gollaher said that Sarah's panties were wet and that she should take them off so that he could hang them up to dry. (R. 931).

Sarah stayed in the hot tub for a period of time, and then got out of the hut tub and went into the bathroom in Gollaher's house where she put on a new, dry night shirt. (R. 932, 935). Sarah did not have an extra pair of underpants and did not ask for another pair. (R. 935-36). Gollaher did not get into the hot tub with Sarah. (R. 932-33). Gollaher did not go into the bathroom with her while she changed into a dry night shirt. (R. 935).

After changing into a dry night shirt, Sarah went back to the trampoline to go to sleep. (R. 932, 935). Gollaher asked Sarah to sleep on the trampoline with her feet by his head. (R. 936). Sarah fell asleep. (R. 937). Sarah was awakened when she felt Gollaher's finger touching her "private." (R. 937). Sarah testified that she did not remember how long Gollaher touched her. (R. 939). Gollaher only rubbed Sarah's "private" one time, "up and down." (R. 962). After the touching, Sarah began moving around on the trampoline and Gollaher moved her back. (R. 938). Sarah got up from the trampoline, put her panties back on, returned to the same spot on the trampoline, and went to sleep. (R. 939-41). Sarah testified that she "tried to stay away" from Gollaher's house after the trampoline incident. (R. 968).

Sarah originally thought that touching incident had been a dream. (R. 969). At the preliminary hearing, Sarah stated that she had thought that the touching incident had been a dream. (R. 969). At trial, Sarah testified that she no longer thought that the touching incident was a dream. (R. 969).

Sarah Call's first disclosure of the trampoline incident took place approximately six months after it occurred and was triggered by watching a girl on a television show who said something happened to her. (R. 918).

CROSS EXAMINATION: Scott and Peter Gollaher slept on the trampoline frequently. (R. 1005). It was not unusual for Sarah and other neighborhood kids to sleep on Gollaher's trampoline. (R. 1006).

Sarah admitted that when people move on the trampoline, it moves everyone else and that moving would wake other people sleeping on the trampoline. (R. 1008-09). Despite the fact that Sarah testified that she was moving around on the trampoline at the time of the touching, Peter did not roll into her and did not wake up. (R. 1007).

Sarah had not been asked by the defense at the preliminary hearing whether she had dreamed up the trampoline incident. Rather, Sarah volunteered that she thought it was dream. (R. 976). When Sarah disclosed the touching incident to her mother, Sarah told her mother that she did not know whether it happened or whether she was dreaming. (R. 1021).

By Sarah's own reckoning, she was at the Gollaher residence a minimum of six times after the trampoline incident without any apparent concern, belying her statement that she "tried to stay away" from Gollaher. These visits included an overnight trip with her dad, her sister Amy Call, Peter Gollaher, and Scott Gollaher to Lehman Caves in which she did not say anything to her dad about not wanting to go on the trip with Gollaher (R. 986-87); visits to the Gollaher home to see Sarah Gollaher (R. 977-78); visits to see Peter Gollaher (R. 978);

visits to play with neighborhood friends (R. 978); a visit when the Fotheringham family was present (R. 981); a visit to babysit Peter Gollaher (R. 1016-17); and a visit on New Year's Eve (R. 904-05).

DEFENDANT'S CASE

WITNESS--SCOTT GOLLAHER (Direct): Sarah frequently went to Gollaher's home during 1993, visiting the play area as many as 40 times and the home as many as 20 times. (R. 1243). Other neighborhood children would also come to the home to play. (R. 1244). It was a common practice for neighborhood children to sleep on the Gollaher's trampoline. (R. 1246). The Gollahers had a rule that children could not play in the play area without adult supervision and could not sleep out on the trampoline without a parent with them. (R. 1246). When sleeping on the trampoline, Gollaher would arrange the adults and children on the trampoline so as to avoid people rolling toward the middle of the trampoline. (R. 1251).

Gollaher recalls sleeping on the trampoline one night with his son Peter and Sarah Call after Sarah's father, Alan Call, left the Gollaher home. (R. 1254-56). Sarah's father, Alan Call, was going to come back over to the home and get into the hot tub. (R. 1256). While Sarah and Gollaher were waiting by the hot tub for Alan Call to return, Gollaher jokingly pushed Sarah into the hot tub. (R. 1256). Sarah's father never returned to the Gollaher home to use the hot tub. (R. 1257).

Eventually, Gollaher gave Sarah a change of clothes and told her to change. (R. 1258). After Sarah changed her clothes, Sarah and Gollaher went to the trampoline. Gollaher's son Peter was already on the trampoline. (R. 1258-59). Gollaher positioned himself, Peter, and Sarah in kind of a triangle so that the children would not sink into him. (R. 1259).

Gollaher did not touch Sarah between the legs while they were on the trampoline. (R. 1260). Gollaher did not inappropriately and intentionally touch Sarah Call to arouse or gratify his sexual desires or to harm her in any way. (R. 1233).

CROSS-EXAMINATION: Sarah came over to Gollaher's home with her father at about 8:00 p.m. or 8:30 p.m. on July 9, 1993 (R. 1277-78). Gollaher and Sarah's father talked until 9:00 p.m. or 10:00 p.m. that night at which time Sarah's father left to go home, indicating that he was going to come back over and use the hot tub with Gollaher and Sarah. (R. 1279, 1281).

Gollaher pushed Sarah into the hot tub. (R. 1286). Sarah said she forgot to take off her underwear. Gollaher said if she wanted him to, he would wring them out and put them on the barbecue to dry. (R. 1286).

Sarah was sleeping in a sleeping bag on the trampoline. (R. 1292). Gollaher was sleeping with blankets. (R. 1292). If Gollaher did touch Sarah, it was not a conscious act and was done while he was asleep. (R. 1292).

OTHER TESTIMONY: Bart Fotheringham, a neighbor of Scott Gollaher, saw Sarah Call at the Gollaher residence over ten times from the summer of 1993 through January 1994. (R. 1186-87). Shauna Fotheringham, also neighbor of Scott Gollaher, saw Sarah Call at the Gollaher residence ten or twenty times at the Gollaher residence from June 1, 1993 to December 31, 1993. (R. 1107). Sarah Gollaher, the wife of Scott Gollaher, saw Sarah Call at the Gollaher residence an average of two or three times a week from June 1, 1993 to December 31, 1993. (R. 1218). Sarah Gollaher did not notice any difference in the way Sarah acted around Scott Gollaher after the alleged trampoline incident. (R. 1221).

FACTS RELEVANT TO SPECIFIC ISSUES ON APPEAL

The following Statement of Facts is organized by the facts relevant to each of the issues on appeal.

Issue 1: Did the District Court commit plain error by allowing extensive testimony regarding a subsequent alleged incident in a hot tub that was the subject of a count that was dismissed at the preliminary hearing, in violation of Rule 404(b) and Rule 403 of the Utah Rules of Evidence?

On or about April 15, 1994, Gollaher was charged by Information with three counts of sexual abuse of a child, in violation of U.C.A. § 75-5-404.1. (R. 13). Count II consisted of an allegation that Gollaher had touched Sarah Call in the genital area with his foot while she was in a hot tub on December 31, 1993. (R. 13-14).

On June 23, 1995, a preliminary hearing was held. (R. 731). At the preliminary hearing, Sarah Call testified that the touching in the hot tub could have been accidental. (R. 801). After the preliminary hearing, the District Court dismissed Count II because Sarah Call testified that the touching could have been accidental. (R. 72, R. 1832).

At trial, the state introduced evidence of the hot tub incident, despite the fact that it had been dismissed after the preliminary hearing. (R. 904-923). The state's reference to the hot tub incident included a detailed explanation of where Sarah Call and Gollaher were located in the hot tub and the following dialogue:

Q. (By Mr. Cope) Did anything unusual happen while you were in the hot tub?

A. Yes.

Q. What was it that happened that you thought was unusual?

A. Scott put his feet between my legs.

Q. And how long were his feet between your legs?

A. I don't know.

Q. Were you able to feel anything or you just thought that?

A. I felt it.

Q. What part of your body did you feel it with?

A. My private.

(R. 913-14).

The state subsequently made repeated references to the hot tub incident.

Q. Well, you thought you got touched in the hot tub, right?

A. Yes.

(R. 915).

Q. Okay. Did you think about doing anything because of what happened in the hot tub?

A. No.

Q. Okay. Did anybody ever, after this day, ask you any questions about this? The hot tub, I mean.

A. No.

Q. So have I ever asked you any questions about this?

A. Yes.

Q. Did I ask you some questions just now about the hot tub?

A. Yes.

(R. 916).

Q. Okay. That's what you just told us, about the hot tub stuff.

A. Yes.

Q. Okay. Was that the same year you said--

A. Yes.

Q. That the hot tub incident happened? You told your mom the same year?

A. Yes.

(R. 920).

Q. So you told your mom about the hot tub?

A. Yes.

Q. You said you thought Scott had touched you with his foot--

A. Yes.

(R. 921).

Q. When you were going to go babysitting. So that wasn't the hot tub thing?

A. No.

Q. So you told her about that one first; is that right?

A. Yes.

Q. Okay. Now, have you told us about that one yet?

A. Yes.

Q. Okay, is that what you just told us about? I'm confused. Can you help me? I know about a hot tub because you just told us all about that.

(R. 921-22).

Q. We already talked about the hot tub, now we are going to talk about something different, right?

A. Yes.

(R. 923).

Q. Okay. Thank you. Now, during the preliminary hearing, Mr. Yengich asked you some questions about how long on New Year's day Mr. Gollaher's foot was in your private part. Do you remember that?

A. Yes.

Q. Do you remember what you told him?

A. Six seconds.

Q. Do you still think that is an accurate assessment of how long that was?

A. Yes.

(R. 969).

Q. (By Mr. Cope) One more question. When you said it was about six seconds for the foot, right?

A. Yes.

(R. 970).

In closing argument, the state then misstates the evidence on two separate occasions, attributing the time period of the touching in the hot tub incident (the subject of the dismissed count) to the time period of the touching in the trampoline incident.

> She says she is awakened by his hand in her vaginal area, rubbing six to nine seconds.

(R. 1323).

> The touching that was described as prolonged. It was six to nine seconds, if you put the evidence together. The touching was skin to skin.

(R. 1316).

In fact, Sarah testified that it was the New Year's Eve hot tub incident that lasted six seconds. (R. 970). Sarah testified that she did not remember how long Gollaher

touched her on the trampoline. (R. 939). She further testified that the touching on the trampoline occurred one time, "up and down." (R. 962).

> The state again refers to the hot tub incident in its closing argument.
>
> She carries that around with her for nine months, until something galvanizes her into thinking that she can't avoid this any more. And that's the incident in the hot tub, again, on or about New Year's Day.

(R. 1323).

In fact, Sarah testified that it was the viewing of the television program that prompted her to disclose the allegations, not the hot tub incident. (R. 918).

There is no record of any objection by defendant's trial counsel to the introduction of the subsequent bad act of the defendant (although a bench conference was requested by the defendant's trial counsel and granted at the time the "bad act evidence" was first introduced. However, no record of the bench conference was made). (R. 910). With regard to the evidence of the subsequent bad act, the Court instructed the jury as follows in jury instruction no. 18:

> You are instructed that the evidence that the defendant touched Sarah Call in the hot tub on or about January 1, 1994, was offered only to set the time frame for when the allegations were made in this case. The court instructs you that you are not to take that incident into consideration in any way in determining the guilt of the defendant.

(R. 164).

Counsel for the defendant objected to jury instruction no. 18, requesting that the court add the following instruction:

> Moreover, the court instructs you that the charge against the defendant was dismissed at the preliminary hearing.

(R. 140, 1376).

The court refused to add the requested language. (R. 140).

It was undisputed that Sarah Call first made the allegations concerning the trampoline incident to her mother, Liz Call, not in connection with anything that happened on December 31, 1993, but in connection with and immediately after Sarah watched a television program in late January 1994. (R. 918). The next day, Mrs. Call spoke with her bishop concerning the allegations. (R. 869). The bishop indicated he would contact the authorities. (R. 877). The allegations came to the attention of Mitchell Clark, a supervisor for the Division of Family Services, on February 1, 1994. (R. 1149). In opening statements, both the state and the defendant indicated that there was no dispute as to when the allegations were made. (R. 838, 855-56).

Issue 2: Was the defendant deprived of his Sixth Amendment right to effective assistance of counsel by reason of his attorney's failure to investigate and present evidence of a transcript of a television program that Sarah Call watched that prompted her disclosure of the alleged abuse?

Sarah Call's first disclosure of the trampoline incident took place six months after it occurred and was triggered by watching a girl on a television program who said something happened to her. (R. 917-18). During the police interview on March 9, 1994, Sarah stated that she had viewed the television program four or five weeks before the police interview. (R. 570). This would place the television program at the end of January or the beginning of February 1994. This time period was confirmed by Sarah's testimony at the preliminary hearing, when she stated that she spoke to her mother immediately after she viewed the television program. (R. 781). The next day Mr. and Mrs. Call went to speak with their bishop. (R. 870-72). By February 1, 1994, the Division of Family Services had been contacted concerning the incident. (R. 1148.) By February 3, 1994, the Division of Family Services had notified the Salt Lake County Sheriff of the allegations. (See Initial

Report Form (R. 586)). Thus, given all of the available information, it was apparent that the television program must have occurred several days prior to February 1, 1994.

The defendant specifically requested that his trial counsel investigate the date of the television program watched by Sarah Call and obtain a transcript. (R. 633). When trial counsel failed to comply with the defendant's request, the defendant reduced the request to writing on December 4, 1995. (R. 634). Among the questions posed by the defendant to his trial counsel was the following:

> Sarah Call testified that she and her father had watched a T.V. show about sexual abuse. Wouldn't it be helpful to know the name of the show and the content. This may lead to determining her motivation. (R. 643).

Even though the approximate date of the television program was known by the time of the preliminary hearing and even though seven months elapsed between the preliminary hearing and the trial, defense counsel made no attempt to identify the television program that prompted the initial disclosure by Sarah Call to her mother. Instead, trial counsel filed an affidavit after the trial stating that the transcript of the television program was new evidence that trial counsel did not know about at trial. (R. 678).

After the trial, the defendant himself, assisted by members of his family and attorneys other than trial counsel, conducted an investigation and located a transcript of an ABC News 20/20 program entitled "Making Him Pay," which aired January 28, 1994. (R. 645).[1] In this program, reporters Barbara Walters and Hugh Downs discuss the case of Desiray Bartak, a child approximately the same age as Sarah Call, who describes on camera incidents of touching by a friend of her father in terms strikingly similar to those used by

---

[1]Trial counsel attempts to take credit for the post-trial investigation in the motion for a new trial based on newly discovered evidence when he says that the program was located by a "thorough investigation by counsel." (R. 263). What trial counsel fails to mention is that he was not that counsel.

Sarah Call to describe the actions of the defendant, who was also a friend of Sarah's father. See "Making Him Pay" Transcript (R. 587-90) (attached in addendum).

The following is a summary of the similarities between Sarah Call's statements about the alleged touching and the story aired on "20/20" about Desiray Bartak.

Similar Characteristics	Desiray Bartak	Sarah Call
Age	10 (R. 587)	10 (R. 764)
Alleged defendant	Father's best friend. (R. 588)	Father's best friend. (R. 764)
Reason for visiting defendant	Had children she liked to play with. (R. 587)	Had children she liked to play with. (R. 978)
Circumstances of alleged molestation	Woke up to defendant massaging and molesting her (R. 587); on a second occasion she had "covers tightly tucked underneath" her and "was tossing and turning" so he couldn't get in. (R. 588)	Woke up to defendant rubbing and molesting her; she "started moving around." (R. 937)
Reaction of victim	Victim did not cry out or urge him to stop, nor did he try to explain what he was doing. Victim pretended to be sleeping because she was too scared. Victim said to herself "It's a dream. Don't believe it, it's a dream." (R. 587)	She did not cry out or urge him to stop, nor did he try to explain what he was doing. She was scared. She went back to sleep. She believed that it was a dream and told her mother she thought it was a dream. (R. 937-40, 1021)
Post-incident behavior	The next day neither the defendant nor the victim spoke of the incident. (R. 587)	The next day neither the defendant nor the victim spoke of the incident. (R. 942)
First reporting of the incident	Reluctant to tell father because defendant was his best friend; told mother. (R. 588)	Reluctant to tell father, who was defendant's close friend; told mother. (R. 919)

In addition, the television program transcript explains how Desiray Bartak received national acclaim and accolades for reporting the abuse. (R. 587-89).

In the motion for a new trial, the defendant presented testimony to the trial court that the television program about Desiray Bartak likely was the program that triggered Sarah Call's disclosure and that evidence of the transcript of the television program would have been important to both defense counsel and the jury. (R. 605, 1589). This testimony was presented by Dr. Phillip W. Esplin, a psychologist with expertise in evaluating and treating children who have been involved in inappropriate sexual conduct and in evaluating "post event circumstances" that can lead to the alteration of recollections or the creation of genuine but mistaken recollections. (R. 602-03). The expert testimony presented to the trial court demonstrated the following:

a. The close similarities between the television program and Sarah's testimony raise questions about the potential effects of the content of the show on Sarah's report. (R. 605, 1590).

b. The importance of knowing what led a victim to come forward at a particular time in order to generate hypotheses about motive of the witness. (R. 1589).

c. The significance of a television program depicting a young girl who had received national acclaim and accolades for reporting the abuse and the effects of such information upon Sarah Call. (R. 1589-90).

d. Sarah's recollection of the trampoline incident lacks sufficient memory traces to have become an independent recollection. (R. 606).

e. Sarah's testimony demonstrates an eagerness to please the questioner, which increases the potential for witness unreliability. (R. 607).

f. Sarah's testimony that she was asleep when the incident occurred raises questions of whether her memory capability was compromised by an altered state of alertness. (R. 606).

g. Generally, when children Sarah's age experience a novel, sexually intrusive, discreet event, they reflect on that event on multiple occasions after its occurrence which increases the strength and vividness of the recollections. This process does not appear to have occurred with Sarah Call. (R. 606).

h. Sarah's various statements suggest the possibility that the trampoline episode may not have been reality based. (R. 607).

The trial court denied the motion for a new trial based on insufficiency of counsel. (R. 1824). In doing so, the trial court specifically (and erroneously) found that the jury had the information regarding the T.V. program.

> It had the information about the T.V. program, and could consider all those things, and did, I suppose.

(R. 1816).

Issue 3: Was there prosecutorial misconduct by the state in its closing argument by arguing matters not in evidence or contradicted by the evidence and by referring to the fact that the defendant failed to call his son as a witness?

Sarah Call testified that she did not know how long Gollaher touched her on the trampoline in July 1993. (R. 937). Sarah also testified that Gollaher only touched her "private" one time, "up and down" during the July 1993 trampoline incident. (R. 962). Sarah testified that the touching in the December 31, 1993 hot tub incident, was for a longer period of time, lasting from six to nine seconds. (R. 969-70, 997-98).

In closing argument, the state falsely represented to the jury that the length of the touching in the December 31, 1993 hot tub incident was actually the length of the touching during the July 1993 trampoline incident, in the following remarks:

- "The touching that was described as prolonged." (R. 1316 (emphasis added)).
- "It was six to nine seconds, if you put the evidence together. The touching was skin to skin." (R. 1316).
- "It was rubbing for a considerable period of time." (R. 1317) (emphasis added).
- "She says she is awakened by his hand in her vaginal area, rubbing six to nine seconds." (R. 1323).

In addition, the state incorrectly tells the jury that Gollaher remembered that he was rubbing Sarah Call. (R. 1317 ("Except that he remembered it was rubbing. It was rubbing for a considerable period of time.") (emphasis added)).

The state also told the jury that Sarah Call's testimony at trial was consistent with her testimony on a videotape that was made. (R. 1325). The videotape was not in evidence. (R. 1325). The defendant's trial counsel objected to this reference. (R. 1325). The trial court denied a motion for a mistrial based on the reference to the videotape, finding that "there was nothing said about what was in the tape or anything like that." (R. 1373).

The state also referred to the fact that the defendant failed to call his son as a witness. (R. 1361). The defendant's trial counsel objected to this remark. (R. 1361).

Issue 4: Was the defendant deprived of his Sixth Amendment right to effective assistance of counsel by reason of his attorney's failure to object to the improper remarks of the prosecutor during closing argument and to the introduction of evidence of the subsequent hot tub incident?

The facts relevant to this issue are fully set forth above under Issue 1 and Issue 3.

SUMMARY OF ARGUMENT

1. The trial court committed plain error by allowing extensive evidence regarding a subsequent bad act of the defendant. This act consisted of an incident on December 31, 1993, when the defendant allegedly touched the victim Sarah Call in the vaginal area with his foot for six seconds while they were in a hot tub. This incident was the subject of a charge that was dismissed after the preliminary hearing because Sarah Call testified that the touching could have been accidental.

The trial court failed to make any finding that (1) there was a necessity for the bad act evidence; (2) it was highly probative of a material issue of the crime charged; and (3) its special probativeness and the necessity for it outweighed its prejudicial effect. See, e.g., State v. Doporto, 935 P.2d 484, 490-91 (Utah 1997).

The trial court apparently admitted the bad act evidence for the purpose of establishing the time frame in which Sarah Call first disclosed the trampoline incident for which the defendant has been convicted. (R. 164). However, the fact that Sarah Call first disclosed the allegations on or about February 1, 1994 was undisputed. Therefore, evidence to establish the time frame when the allegations were made "was wholly unnecessary because that fact was admitted." Id. at 491. Additionally, by Sarah Call's own testimony, it was the viewing of a television program in late January 1994 that prompted the disclosure of the trampoline incident. Thus, it was the date of the television program that was relevant to the time frame of the disclosure, not the date of the hot tub incident. In any event, the state went far beyond what was necessary to establish time frame, eliciting testimony in graphic detail and referring to the subsequent bad act over twenty times in direct testimony and making it a focal point in closing argument.

The subsequent bad act in the hot tub on December 31, 1993, was not probative of any material issue of the crime charged. Any minor probative value was greatly outweighed by its prejudicial effect. The prejudicial effect is compounded by the fact that the trampoline incident in July 1993 also involved a visit to the hot tub prior to the touching on the trampoline. Indeed, the state itself misstated the evidence in its closing argument, falsely representing that the length of the touching in the subsequent hot tub event was actually the length of the touching on the trampoline.

The state's case was extremely weak. This was a one witness case. There was a total absence of any physical proof the offense occurred. Sarah Call's testimony was inherently suspect because she testified that the incident occurred while she was awakening from a state of sleep and because she thought the incident was actually a dream. In light of the weakness of the state's case, it is highly likely that the introduction of the evidence regarding the subsequent hot tub incident led to a different outcome than would have resulted had the trial court properly excluded the evidence.

2. The defendant was denied his Sixth Amendment right to effective assistance of counsel by reason of his trial counsel's failure to investigate and obtain a copy of the television program that prompted Sarah Call to report that she had been abused. The approximate date of this television program was certainly known by trial counsel by June 23, 1995, the date of the preliminary hearing. The defendant specifically requested that trial counsel investigate and obtain a copy of the transcript of that television program. Despite the fact that the approximate time frame of the television program was known, and despite specific requests from the defendant, trial counsel failed to investigate and obtain a transcript of the television program.

A transcript of the television program was obtained by the defendant after trial. The transcript shows a disturbing similarity between Sarah Call's testimony and the story of Desiray Bartak, the young girl featured in the television program. The transcript also reveals that the young girl on the television program had received national attention and accolades for coming forward with her alleged story of abuse. The defendant presented evidence to the trial court that the similarities between the television program and Sarah's testimony raise questions about the potential effects of the content of the show on Sarah's report. The defendant also presented evidence to the trial court that knowledge of the transcript of the program, which revealed the praise and attention received by the young girl, provided a possible motive for Sarah Call's story.

Contrary to the trial court's finding, the jury did not have evidence of the television program transcript before it. Rather, it only knew that Sarah had watched some television program. The introduction of the television program transcript would have impacted the credibility of Sarah's testimony.

The failure of trial counsel to properly investigate a case constitutes ineffective assistance of counsel. State v. Templin, 805 P.2d 182 (Utah 1990). Given the weakness of the state's case, including the suspect recollection of Sarah Call, additional evidence casting any degree of doubt on Sarah Call's testimony would have likely led to a different outcome at trial.

3. The prosecutor incorrectly told the jury in closing argument that the defendant remembered "rubbing" Sarah Call when in fact, the defendant denied ever touching her. In addition, the prosecutor incorrectly told the jury that the length of the touching on the trampoline was "prolonged," "considerable," and lasted "six to nine seconds," when in fact Sarah Call testified that she did not know how long she was touched and testified that she was

touched one time, "up and down." It was the subsequent hot tub incident six months later that lasted six to nine seconds.

The prosecutor also improperly told the jury that Sarah Call's testimony at trial was consistent with her testimony on a videotape that was not introduced as evidence. Finally, the prosecutor improperly remarked to the jury that the defendant had failed to call his son as a witness, inferring that the son's testimony would have been unfavorable.

4. The defendant was denied his Sixth Amendment right to effective assistance of counsel by reason of his trial counsel's failure to object to the improper remarks of the prosecutor during closing argument and failing to object to the introduction of evidence of the hot tub incident.

ARGUMENT

POINT I

THE TRIAL COURT ERRED BY ALLOWING EXTENSIVE EVIDENCE OF A SUBSEQUENT BAD ACT THAT WAS THE SUBJECT OF A COUNT THAT HAD BEEN DISMISSED AT THE PRELIMINARY HEARING.

Rule 404(b) of the Utah Rules of Evidence provides as follows:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Utah R. Evid. 404(b).[2]

---

[2]The appellant has found no Utah cases addressing the admissibility of "subsequent" acts as opposed to "prior" acts. By its terms, Rule 404(b) does not distinguish between "prior" and "subsequent" acts. Moreover, other courts have determined that the principles governing other crimes are the same whether the conduct occurred before or after the offense charged. See, e.g., United States v. Latney, 108 F.3d 1446, 1450 (D.C. Cir. 1997); United States v. Olivo, 80 F.3d 1466, 1469 (10th Cir.), cert. denied, 117 S.Ct. 265 (1996). Consequently, the cases cited by appellant dealing with admissibility of "prior" acts are

The Utah Supreme Court has indicated that the introduction of evidence of other acts presents "dangers to the fairness and integrity of a trial . . ." These dangers include "[t]he over-strong tendency to believe the accused guilty of the charge merely because he is a likely person to do such acts," and "the tendency to condemn not because the accused is believed guilty of the present charge but because he has escaped unpunished from other offenses." State v. Doporto, 935 P.2d 484, 490-91 (Utah 1997). The purpose of Rule 404(b) is to avoid these dangers by proscribing the use of evidence of other acts except in narrow circumstances. Id. at 491.

In Doporto, the Utah Supreme Court summarized the requirements that must be met before evidence of other acts may be admitted pursuant to Rule 404(b).

> To assure the integrity of the trial process, we hold that evidence of prior crimes is presumed to be inadmissible and that, prior to admitting it, the trial court must find (1) there is a necessity for the prior crime evidence, (2) it is highly probative of a material issue of the crime charged and (3) its special probativeness and the necessity for it outweigh its prejudicial effect.

Id. at 490 (emphasis added) (relying on State v. Johnson, 748 P.2d 1069, 1075 (Utah 1987) and State v. Dibello, 780 P.2d 1221, 1229-30 (Utah 1989)).

In State v. Dibello, the court made clear that the burden is on the "proponent of the evidence" to show that the potential for unfair prejudice did not outweigh its probativeness. State v. Dibello, 780 P.2d 1221, 1229 (Utah 1989).

> Because of this, we have held that when evidence of this type is offered, the presumption shifts; the evidence's potential for unfair prejudice is presumed to outweigh its probativeness, and the burden is on the proponent to show that this is not so.

Id.

---

fully applicable to the issue of admissibility of the "subsequent" act at issue in this case.

The state also "bears the burden of demonstrating that the improperly elicited testimony was harmless beyond a reasonable doubt." State v. Morrison, 1997 WL 228510 at *3 (Utah Ct. App., May 8, 1997).

The Supreme Court further held that it will "review the trial court's rulings on these issues more closely than ordinary rulings on relevance and with limited deference." Id. "Consequently, we will examine a trial court's decision under Rule 404(b) with very limited deference, according it a relatively small degree of discretion." Id. at 489.

The court will reverse based on an evidentiary error, even in the absence of an objection by defense counsel, if the admission of the evidence was "plain error." Under the plain error standard, the court will reverse if an error existed and the error was both obvious and harmful. State v. Olsen, 869 P.2d 1004, 1010 (Utah Ct. App. 1994).

As set forth below, the requirements for admissibility of evidence of other acts were not met in the court below. Further, the admission of the subsequent bad act evidence was plain error and harmful to the defendant.

A. The Lower Court Failed to Make the Necessary Findings with Regard to the Subsequent Bad Act Evidence.

Prior to admitting evidence of other acts, a trial court "must find" that (1) there is a necessity for the evidence, (2) the evidence is "highly probative" of a "material issue" of the crime charged, and (3) its special probativeness and the necessity for it outweighs its prejudicial effect. Doporto, 935 P.2d at 490; Johnson, 748 P.2d at 1075; Dibello, 780 P.2d at 1229. In this case, the court made no findings whatsoever as to the subsequent bad act relating to the New Year's Day hot tub incident. The court only refers to the bad act evidence

in jury instruction No. 18, in which it instructs the jury that the incident "was offered only to set the time frame for when the allegations were made in this case." (R. 164).[3]

The trial court made no findings concerning the "necessity" of the evidence of the subsequent act. The trial court made no findings regarding whether evidence of an act occurring six months after the incident for which the defendant was convicted was "highly probative" of a "material issue" of the crime charged. The state did not meet its burden of presenting evidence that the "potential for unfair prejudice does not 'outweigh its probativeness,'" Dibello, 780 P.2d at 1229, and the trial court made no findings in this regard. The trial court committed plain error by failing to make any of the necessary findings prior to allowing the evidence of the subsequent bad act to be presented to the jury and the defendant's conviction should be reversed.

B. Evidence of the Subsequent Hot Tub Incident Was Not Relevant, Was Not Necessary to Establish Time Frame, and Was Not Probative of any Material Issue of the Crime Charged.

Rule 404(b) flatly prohibits evidence of other acts to prove the character of a person in order to show action in conformity therewith. Doporto, 935 P.2d at 491. However, evidence of other acts may be used "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Rule 404(b).

In Doporto, the Supreme Court explained that even if evidence of other acts is relevant to prove such issues, the other act must meet certain standards.

---

[3]During the presentation of the bad act evidence by the prosecution, Gollaher's attorney asked for and was granted a bench conference. (R. 910). However, there is no record of what transpired at the bench conference and the record discloses only that the prosecution continued the same line of questioning after the bench conference. (R. 910). As the Court of Appeals made clear in State v. Olsen, 869 P.2d 1004, 1009 n.7, dealing with a similar situation, the failure to make a record of the bench conference prevents the appellate court from considering the conference on appeal.

> First, it must be necessary; it cannot be used to prove a point not really contested. Second, it must be strongly probative of a material issue, a probativeness that cannot serve as a ruse for showing that the defendant's propensity is such that he is likely to have committed the kind of crime charged.

Doporto, 935 P.2d at 491 (emphasis added).

1. There was no dispute as to the time frame when the allegations were made.

The crime for which Gollaher was charged was the touching of the genitals of Sarah Call while sleeping on a trampoline on or about July 1993. (R. 149). It was undisputed that Sarah Call first disclosed the allegations regarding the trampoline just prior to February 1, 1994. The fact that there was no dispute concerning the date when Sarah first made the allegations against Gollaher is clear from the opening statements, with both counsel representing that the allegations came to light on or about February 1, 1994.

Mr. Cope: "Mitch Clark . . . will tell you on the first day of February, 1994, he received a report that implicated Mr. Gollaher in sexual abuse of Sarah." (R. 838).

Mr. Yengich: "On February 1, or thereabouts, she is watching a show on television. . . . and she tells mom." (R. 855-56).

In this case, as in Doporto, evidence of the time frame when Sarah first reported the trampoline incident "was wholly unnecessary because that fact was admitted." Doporto, 935 P.2d at 491.

2. It was the date of the television program viewed by Sarah Call, not the date of the hot tub incident, that was necessary to establish the time frame in which Sarah Call made the allegations at issue in the case.

The court instructed the jury that the evidence of the subsequent hot tub incident was "offered only to set the time frame for when the allegations were made in this case." (R. 164). However, the subsequent hot tub incident was not the event that triggered the disclosure by Sarah. Rather, the record is clear that the disclosure of both the trampoline

incident and the New Year's Eve hot tub incident were triggered by Sarah's viewing of a television program about a girl who claimed to have been abused. (R. 918).

Thus, it is the date of the television program that is relevant to the disclosure of the allegations, not the date of the hot tub incident. In fact, Sarah testified that she did not know how much time elapsed between the hot tub incident and her disclosure of the allegations to her mother. (R. 917-918). She did testify, however, that she made the disclosure the same night as the T.V. program. (R. 919). Thus, the hot tub incident was not relevant to establishing the time when the allegations were made. Moreover, the time of reporting is not even relevant to the charge in this case.

3. The state went far beyond what was necessary to establish time frame when the allegations were made.

The state did not limit the evidence to the facts necessary to establish the time frame in which Sarah first disclosed the trampoline incident, greatly compounding the prejudicial effect of the testimony. Rather, the state presented evidence of where Gollaher allegedly touched Sarah (on her "private") and for how long she thought Gollaher touched her ("six seconds"). (R. 913-14, 969-70). As set forth in the statement of facts, the state referred to this incident again and again, drilling into the jury the evidence of the subsequent bad act. (R. 913-16, 920-23, 969-70). The state referred to the subsequent bad act over 20 times in direct testimony and brought it up again three times in closing argument.

An example of the improper and prejudicial repetition of the subsequent act evidence is illustrated at the close of the state's direct examination of Sarah. The hot tub incident was introduced on Sarah's first day of testimony. On the second day of testimony, near the end of the state's direct examination of Sarah, the state inexplicably jumped from testimony regarding the July 1993 incident to the New Year's Eve hot tub incident, eliciting

testimony that the touching in the hot tub lasted six seconds. The prosecutor then immediately repeated the evidence, stating as follows:

> Q. (By Mr. Cope) One more question. When you said it was about six seconds for the foot, right?
>
> A. Yes.

(R. 970).

Even if evidence of the hot tub incident was necessary to establish when Sarah made the allegations, which it was not, there was no possible reason to introduce into evidence the details of the incident, including the amount of time Gollaher's foot allegedly touched Sarah's vaginal area, other than to prejudice the defendant by attempting to show the jury that "the defendant's propensity is such that he is likely to have committed the kind of crime charged." Doporto, 935 F.2d at 491.

Indeed, that this was the intent of the state seems clear in closing argument when the prosecutor argues that it was "the incident in the hot tub, again," that "galvanized" Sarah Call into believing that she had been abused. (R. 1323). Clearly, the use of the work "again" serves no purpose other than to imply that the defendant had a propensity to commit the type of crime charged. This is not proper under Rule 404(b).

4. The hot tub incident was not probative of any material issue of the crime charged.

Even if relevant and necessary, evidence of other acts must be "highly probative of material issue of the crime charged." Id. at 490. The only material issue of the crime charged was whether Scott Gollaher improperly touched Sarah Call sometime in July 1993. The hot tub incident, which occurred approximately six months after the trampoline incident, was not relevant in any way to the whether the July 1993 incident occurred. The date the allegations were first reported is not relevant to the crime charged.

C. Any Probativeness of Evidence of the Subsequent Hot Tub Incident Was Greatly Outweighed by its Prejudicial Effect.

Even if the subsequent act evidence had some relevance, "it is still subject to the protections of Utah R. Evid. 403." State v. Cox, 787 P.2d 4, 5 (Utah Ct. App. 1990). See also Doporto, 935 P.2d at 493 (stating that "even if the prior crime evidence had some minor probative value, the trial court's ruling under Utah Rule of Evidence 403 that the prejudicial effect of the evidence did not substantially outweigh its probative value was also incorrect.") The trial court was required to make findings as to whether that probative value outweighed the prejudicial effect. Doporto, 935 P.2d at 490. The court made no such findings.

The severe prejudicial effect that evidence of other "crimes, wrongs, or acts" can have was clearly explained in Doporto. The prejudicial effect includes, "[t]he over-strong tendency to believe the accused guilty of the charge merely because he is a likely person to do such acts." Id.. In this case, after having the subsequent hot tub incident repeatedly drilled into them, the jury is more likely to believe the defendant committed the touching in July 1993 because he has a history of similar acts.

The prejudicial effect of allowing evidence of the New Year's Eve hot tub incident is compounded in this case because the July 1993 trampoline incident also involved testimony regarding Sarah getting into the hot tub. (R. 929-34). The defendant did not get into the hot tub with Sarah at the July 1993 trampoline incident. (R. 932-33). However, the defendant was in the hot tub with Sarah at the New Year's Eve hot tub incident and allegedly touched her vaginal area with his foot for six seconds at that time. (R. 913-16, 920-23, 969-70). Introduction of the subsequent hot tub incident was extremely likely to lead the jury into

confusing the testimony relating to the hot tub incident with facts relating to the trampoline incident.

Indeed, the state itself misstated the evidence in its closing argument, falsely attributing facts relating to the hot tub incident to the trampoline incident. The prosecutor represented to the jury that

> The touching that was described as prolonged. It was six to nine seconds, if you put the evidence together. The touching was skin to skin.

(R. 1316).

On a second occasion, the prosecutor told the jury that

> [s]he says she is awakened by his hand in her vaginal area, rubbing six to nine seconds.

(R. 1323).

In fact, Sarah testified that it was the New Year's Eve hot tub incident, not the trampoline incident, that lasted six seconds. (R. 970). Sarah testified that she did not remember how long Gollaher touched her on the trampoline. (R. 939). She further testified that the rubbing occurred one time, "up and down." (R. 962).

The risk of prejudicial effect from confusing the two incidents became a reality in the closing argument of the state. The jury was now presented with two events that could be and were easily confused, coupled with the false representation by the state that the touching on the trampoline lasted as long as nine seconds, when in reality, the testimony was that the alleged touching was more brief, once up and once down. (R. 962). The subsequent

act in the hot tub had no probative value and presented a high potential for unfair prejudicial effect on the defendant.[4]

D. Admission of Evidence of the Subsequent Hot Tub Incident was Harmful Error.

For error to be harmful, there must be a "reasonable possibility that the evidence complained of might have contributed to the conviction." Morrison, 1997 WL 228510 at *3; State v. Featherson, 781 P.2d 424, 431 (Utah 1989) (there must be a "reasonable likelihood of a more favorable result for the defendant in its absence."). In evaluating harm, the court looks at "a host of factors, including . . . the overall strength of the state's case." State v. Olsen, 869 P.2d 1004, 1011 (Utah Ct. App. 1994). Other factors that may be considered in determining harm is whether the reference was isolated and whether the trial court gave a limiting instruction. State v. Reyes, 861 P.2d 1055, 1057 (Utah Ct. App. 1993).

First and foremost, the state's case was extremely weak. This was a one witness case. There was a total absence of any physical proof that the offense occurred. The state's only witness, Sarah Call, was 10 years old when the incident took place and only 13 years old when she testified. The incident lasted only a few seconds. Sarah's testimony was inherently suspect because her initial memory of the incident was, by her own voluntary statements, that it was nothing more than a dream.[5] When Sarah first reported the incident to her mother over six months later, she voiced self doubt, saying that she did not know whether

---

[4]Although, as noted above, Rule 404(b) does not distinguish between "prior" and "subsequent" acts, it has been noted that in some circumstances subsequent extrinsic offense evidence may be substantially less relevant than would a prior extrinsic offense. See, e.g., United States v. Jimenez, 613 F.2d 1373, 1376 (5th Cir. 1980) (subsequent extrinsic offense "bears substantially less on predisposition that would a prior extrinsic offense."). Thus, the trial court's error here had the potential for even greater harm than if prior bad act evidence were involved.

[5]We now know that her report also conformed to the content of a television program she had just seen.

it really happened or whether it was a dream. According to Sarah's testimony, the brief incident on the trampoline occurred during an altered state of mental alertness while she was awakening from a state of sleep. Gollaher denied touching Sarah on the trampoline. The evidence at trial from four different witnesses established that Sarah visited the Gollaher residence numerous times after the incident, contradicting her statement that she tried to stay away from the Gollaher residence.

The prejudicial effect of the subsequent hot tub incident is exacerbated by the fact that the reference to the subsequent act was not isolated. Reyes, 861 P.2d at 1057. As explained above, the state referred to the hot tub incident over twenty times and over a period of two days, concluding its examination of Sarah Call with testimony regarding the hot tub incident, and made the hot tub incident a focal point of closing argument, confusing the two events and stating that it was the hot tub incident, "again," that "galvanized" Sarah into believing that the trampoline incident actually happened, implying that the defendant had a propensity to commit the acts charged. (R. 1323 (emphasis added)).

In light of the weakness of the state's case, it is highly likely that the introduction of the evidence regarding the subsequent bad act led to a different outcome than would have resulted if the trial court had properly excluded the evidence. Given the weakness of the state's case, the repeated reference to the subsequent act evidence, and the state's confusing, misleading, and inaccurate statements with regard to the subsequent bad act, and the accompanying prejudicial effect, the limiting instruction by the court was not sufficient to undo the damage that had been done. It is well accepted that limiting instructions cannot "undo serious prejudice." State v. Peters, 796 P.2d 708, 712 (Utah Ct. App. 1990). See also Bruton v. United States, 391 U.S. 123, 136, 88 S.Ct. 1620, 1628 (1968) (holding that clear instructions to the jury to disregard inadmissible hearsay evidence inculpating the defendant

was not sufficient to cure the error); Krulewitch v. United States, 336 U.S. 440, 453, 69 S.Ct. 716, 723 (1949) (Jackson, J., concurring) ("[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction."). At most, a limiting instruction may "reduce somewhat" the prejudice suffered by the defendant. Peters, 796 P.2d at 712.

In this case, the limiting instruction's effectiveness in reducing prejudice was diminished by the fact that the instruction was not given "at the earliest opportunity," Reyes, 861 P.2d at 1057, but was delayed until the conclusion of the case. (R. 164).

In light of all the foregoing factors, there is a "reasonable likelihood of a more favorable result for the defendant" in the absence of the improper admission of the subsequent bad act evidence. Featherson, 781 P.2d at 431.

E. The Admission of Evidence of the Subsequent Hot Tub Incident was Obvious Error.

To find plain error, it must appear from an examination of the record "that it should have been obvious to a trial court that it was committing error." State v. Eldredge, 773 P.2d 29, 35 (Utah), cert. denied, 493 U.S. 814 (1989). See also State v. Verde, 770 P.2d 116, 122 n.11 (Utah 1989) (the "obviousness" prong of the plain error rule amounts to the appellate court reaching the conclusion that, given the circumstances, "the trial court should have been aware that an error was being committed at the time."). As the Utah Supreme Court made clear in Doporto, "the principle that evidence is not admissible to show a defendant's bad character or propensity to commit criminal acts is a fundamental tenant of American jurisprudence and has been recognized in this Court's opinions for over ninety years." It has been recognized that generally, inquiry into the details of other crimes, wrongs, or acts constitutes "plain error." See, e.g., State v. Tucker, 800 P.2d 819, 821 (Utah Ct.

App. 1990) ("Generally, inquiry into the details of prior convictions has been found to be so prejudicial as to amount to plain error.").

In this case, the obviousness of the error is underlined by the fact that the trial court had already dismissed the charge concerning the hot tub incident after the preliminary hearing. (R. 72, R. 1832). Having dismissed the charge, the trial court was well aware of the fact that this incident was another "wrong or act" as defined in Rule 404(b), that there was insufficient evidence to support the charge, and that Rule 404(b) precluded admission of the subsequent bad act evidence.

POINT II

THE DEFENDANT WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY REASON OF HIS ATTORNEY'S FAILURE TO INVESTIGATE AND PRESENT EVIDENCE OF A TRANSCRIPT OF A TELEVISION PROGRAM THAT SARAH CALL WATCHED THAT PROMPTED HER DISCLOSURE OF THE ALLEGED ABUSE.

The Sixth Amendment guarantees an accused "the right . . . to have Assistance of counsel for his defense." U.S. Const. amend. VI. "The right to counsel has been held to be 'the right to effective assistance of counsel.'" State v. Templin, 805 P.2d 182, 186 (Utah 1990) (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)). In determining whether criminal defendants have been denied the constitutional right to effective assistance of counsel, the Utah Supreme Court has followed the United States Supreme Court's decision in Strickland v. Washington, 104 S.Ct. 2052 (1984). In Strickland, the Supreme Court established a two part test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so

> serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 2064.

To satisfy the first prong of the Strickland test, a defendant must "'identify the acts or omissions' which, under the circumstances, 'show that counsel's representation fell below an objective standard of reasonableness.'" Templin, 805 P.2d at 186 (quoting Strickland, 104 S.Ct. at 2066, 2064). To satisfy this prong, a "defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Templin, 805 P.2d at 186 (quoting Strickland, 104 S.Ct. at 2065). In determining whether counsel's performance was ineffective, the court cannot rely on counsel's experience or on whether counsel met the "prevailing norms," but must instead "look to counsel's actual performance to determine whether it was adequate." Taylor v. Warden, 905 P.2d 277, 282 (Utah 1995).

To meet the second prong of the test, a defendant "'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Templin, 805 P.2d at 187 (quoting Strickland, 104 S.Ct. at 2068).

The defendant has established both prongs of the Strickland test, and the conviction should be reversed based on ineffective assistance of counsel.

A. Trial Counsel Failed to Properly Investigate and Obtain a Copy of the Television Program Transcript.

The Utah Supreme Court has made clear that failure to conduct a proper pretrial investigation does not meet the objective standard of reasonableness required to provide effective assistance of counsel. In Templin, a defendant moved for a new trial based on

ineffective assistance of counsel, claiming that trial counsel failed to contact several potential witnesses named by the defendant. The trial court denied the motion, concluding that even if the witnesses had been called, the outcome of the trial would likely have remained the same. On appeal, the Supreme Court reversed and remanded. In so doing, the Court made clear that failure to investigate satisfies the first part of the Strickland test.

> If counsel does not adequately investigate the underlying facts of a case, including the availability of prospective defense witnesses, counsel's performance cannot fall within the "wide range of reasonable professional assistance." This is because a decision not to investigate cannot be considered a tactical decision. It is only after an adequate inquiry has been made that counsel can make a reasonable decision to call or not to call particular witnesses for tactical reasons. Therefore, because defendant's trial counsel did not make a reasonable investigation into the possibility of procuring prospective defense witnesses, the first part of the Strickland test has been met.

Templin, 805 P.2d at 188. See also Taylor, 905 P.2d at 283 (holding that there was no ineffective assistance of counsel where counsel interviewed individuals the defendant identified as potential witnesses).

In State v. Huggins, 920 P.2d 1195 (Utah Ct. App. 1996), the court explained that "'[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" Id. at 1198 (quoting State v. Crestani, 771 P.2d 1085, 1090 (Utah Ct. App. 1989)).

In this case, the defendant specifically requested that his trial counsel investigate the date of the television program watched by Sarah Call and obtain a transcript. (R. 633). Trial counsel failed to do so. After the trial, the defendant himself conducted an investigation and obtained a copy of the transcript. (R. 645). His trial counsel then filed a motion for a

new trial based on newly discovered evidence, arguing that the television transcript could not have been obtained prior to trial. (R. 266, 678). However, "'new evidence' is not evidence which was available to defendant but not obtained by him prior to the time of trial. Nor is it evidence that he knew about or could have discovered prior to trial." State v. Williams, 712 P.2d 220, 223 (Utah 1985) (citations omitted).

Trial counsel filed an affidavit with the trial court stating that neither the defendant nor trial counsel "was aware of the program ." (R. 678). However, it is clear from the record that all the parties knew early on that Sarah Call had watched the television program. Furthermore, it was clear that the television program must have aired several days prior to February 3, 1994. During the March 9, 1994 police interview, Sarah revealed that the television program had prompted her disclosure of the allegations and that she had watched the program four to five weeks before the interview, placing the program at the end of January or beginning of February 1994. (R. 570). This information about the television program was confirmed by Sarah during the June 23, 1995 preliminary hearing. (R. 780-81). It was clear at that time that Sarah disclosed the allegations to her mother immediately after watching the program, and that the Division of Family Services had contacted the Salt Lake County Sheriff of the allegations by February 3, 1994. (R. 586).

Trial counsel knew about the television program. The defendant specifically asked defense counsel to obtain a transcript of the program. Trial counsel simply failed to investigate and obtain a copy of the transcript. The defendant's trial counsel's failure to adequately investigate the facts of this case and obtain a copy of the television program transcript constitutes ineffective assistance of counsel. Templin, 805 P.2d at 188.

B. There is a Reasonable Probability That, But For Trial Counsel's Failure to Investigate, the Result of the Trial Would Have Been Different.

In determining whether trial counsel's unprofessional errors affected the outcome of the trial, the court "should consider the totality of the evidence, taking into account such factors as whether the errors affect the entire evidentiary picture or have an isolated effect and how strongly the verdict is supported by the record." Templin, 805 P.2d at 187 (citing Strickland, 104 S.Ct. at 2069).

The weakness of the state's case has been set forth in detail above. In Templin, as in this case, the conviction was "not strongly supported by the record," in that there was only one witness who gave direct evidence of the defendant's guilt, and there was no independent physical evidence. Id. The testimony of the witness in this case, Sarah Call, was inherently suspect because she testified that the incident occurred while she was coming out of a state of sleep, and that she had long thought that the incident was only a dream. (R. 937, 969). Thus, additional evidence casting doubt on Sarah Call's testimony would have likely led to a different outcome at trial.

1. The similarity between the television program and Sarah Call's testimony, coupled with Sarah's testimony that she thought the incident was a dream, cast doubt on the accuracy of Sarah's testimony.

There is no doubt that Sarah's testimony parallels the story of Desiray Bartak in the television program that Sarah watched. See comparison between Bartak story and Sarah Call testimony, supra at 17. It is undisputed that Sarah had thought that the trampoline incident was a dream. (R. 969). It is also undisputed that viewing the television program prompted Sarah to disclose the trampoline incident to her mother. (R. 918) But even then, Sarah still informed her mother that she did not know whether it happened or whether she was dreaming. (R. 1021). Given Sarah's vague and uncertain recollection, the similarity between

the television program and Sarah's testimony, and the fact that it was the television program that triggered Sarah's disclosure, a jury could have reasonably concluded that the television program altered and affected Sarah's testimony.

The defendant presented evidence to the trial court that the similar characteristics between the television program and Sarah's testimony raises questions about the potential effects of the content of the show on Sarah's report. (R. 605, 1590). Indeed, the trial court itself noted the negative impact that exact testimony from two instances can have, remarking that if Sarah Call's testimony at trial had been exactly the same as her testimony at the preliminary hearing, "I'd really be worried about it . . . ." (R. 1821-22). Evidence of the transcript of the television program would have provided the jury with that same worry, causing the jury to wonder why Sarah's testimony was so similar to the story she had just heard on television.

The trial court denied the motion for a new trial based on ineffective assistance of counsel, finding that the jury "had the information about the T.V. program, and could consider all those things, and did, I suppose." (R. 1816). This is a clearly erroneous finding and must be set aside. Templin, 805 P.2d at 186. The record is clear that the only information the jury had was that Sarah had watched a television program that prompted her disclosure. (R. 918). The jury did not have the evidence of the transcript of the television program, which reveals the disturbing similarities between Sarah Call's testimony and the story of Desiray Bartak. Given the weakness of the state's case, this additional evidence would have cast additional doubt on Sarah's testimony, affecting the entire evidentiary picture and likely leading to a different outcome.

2. Evidence of the contents of the television program would have provided evidence of a motive for Sarah Call's testimony.

In his motion for a new trial based on ineffective assistance of counsel, the defendant also presented evidence to the trial court that it is important to know what led a victim to come forward at a particular time in order to generate hypotheses about motive of the witness. (R. 1589). The television program at issue in this appeal depicted a young girl who had received national acclaim and accolades for reporting the abuse. (R. 587-90, 1589). Contrary to the finding of the trial court, the jury did not have this information before it. (R. 1816). The acclaim and accolades received by Desiray Bartak could have provided a motive for Sarah Call making her own, nearly identical allegations. Again, given the weakness of the state's case, such motive evidence would have cast additional doubt on Sarah's testimony, likely leading to a different outcome.

POINT III

THE STATE COMMITTED PROSECUTORIAL MISCONDUCT IN ITS CLOSING ARGUMENT BY ARGUING MATTERS NOT IN EVIDENCE OR CONTRADICTED BY THE EVIDENCE AND BY REFERRING TO THE FACT THAT THE DEFENDANT FAILED TO CALL HIS SON AS A WITNESS.

An appellate court will reverse a jury verdict on the basis of prosecutorial misconduct if the defendant demonstrates that

> "[t]he actions or remarks of [the prosecutor] call to the attention of the jury a matter it would not be justified in considering in determining its verdict, and, if so, under the circumstances of the particular case, whether the error is substantial and prejudicial such that there is a reasonable likelihood that, in its absence, there would have been a more favorable result."

State v. Tenney, 913 P.2d 750, 754-55 (Utah Ct. App.) (quoting State v. Wright, 893 P.2d 1113, 1118 (Utah Ct. App. 1995).

This court has held that "[a] comment by a prosecutor during closing argument that the jury consider matters outside the evidence is prosecutorial misconduct." State v. Palmer, 860 P.2d 339, 344 (Utah Ct. App. 1993). In this case, there is no question that the prosecutor made improper comments on matters that were not in evidence. Such comments constitute prosecutorial misconduct. The only question is whether the comments were so prejudicial that there is a reasonable likelihood that in their absence there would have been a more favorable result to the defendant. This issue of harm is the same issue that has been addressed in detail above. The harmfulness of the improper comments must be considered in light of the weakness of the state's case and the fact that the improper comments went directly to the heart of the case, i.e., the touching of Sarah Call by Scott Gollaher. Each of the improper comments prejudiced the defendant.

A. Prosecutor's Improper Comments on Matters Outside of the Evidence.

1. The prosecutor improperly told the jury that the defendant remembered "rubbing" Sarah Call.

The prosecutor told the jury that the defendant remembered touching Sarah Call.

> "Except that he remembered it was rubbing. It was rubbing for a considerable period of time." (R. 1317 (emphasis added)).

There was no evidence that Gollaher remembered it was rubbing. To the contrary, Gollaher testified that he did not touch Sarah. (R. 1260). As in State v. Palmer, this misstatement "went to the heart of the state's case." Palmer, 860 P.2d at 344. There can be no more prejudicial statement than for the prosecutor to tell the jury that the defendant remembered doing an act that the defendant denied doing. This misstatement alone is sufficient to justify a reversal of the conviction.

2. The prosecutor improperly and incorrectly told the jury that the touching on the trampoline was prolonged and lasted six to nine seconds.

In closing argument, the prosecutor spent a great deal of time telling the jury that the evidence had been that Gollaher touched Sarah Call on the trampoline for a "prolonged," "considerable" period of time, "six to nine seconds."

- "It was six to nine seconds, if you put the evidence together. The touching was skin to skin." (R. 1316).
- "She says she is awakened by his hand in her vaginal area, rubbing six to nine seconds." (R. 1323).
- "It was rubbing for a considerable period of time." (R. 1317) (emphasis added).
- "The touching that was described as prolonged." (R. 1316 (emphasis added)).

These statements are in direct conflict with the actual evidence. In fact, Sarah Call testified that she did not know how long Gollaher touched her on the trampoline in July 1993. (R. 937). Sarah also testified that Gollaher only touched her "private" one time, "up and down" during the July 1993 trampoline incident. (R. 962). It was the subsequent bad act in the hot tub on December 31, 1993, not the July 1993 trampoline incident, that allegedly lasted from six to nine seconds. (R. 969-70, 997-98).

The prosecutor clearly tried to convince the jury that the length of the touching during the December 31, 1993 incident was in fact the length of the touching during the July 3, 1993 incident. There is a substantial difference between a short touching "up and down" that could not have lasted more than a second or two, and a "prolonged" touching for a "considerable" amount of time, from "six to nine seconds." As the prosecutor himself argued to the jury, the touching "could have been inadvertent" if it were a short touching. (R. 1317). See also State v. Peters, 796 P.2d 708, 711 (Utah Ct. App. 1990) (holding that "the duration of the defendant's act" is a factor to consider in whether "indecent liberties" had been taken in

violation of the sexual abuse statute). However, a longer touching, the prosecutor argued, presented "pretty firm circumstantial evidence that the person who was doing it was awake." (R. 1317). Unfortunately, the prosecutor had misrepresented the evidence with regard to the length of the touching on the trampoline. This misstatement was extremely prejudicial to the defendant, providing the jury with the impression that the touching could not have been accidental.

3. The prosecutor improperly told the jury that Sarah Call's testimony at trial was consistent with her testimony on a videotape that was not introduced into evidence.

The evidence in this case included testimony from Mitchell Clark, a Division of Family Services employee, that a videotape was made of an interview with Sarah Call on March 9, 1994. (R. 1153). There was no evidence whatsoever of the contents of that videotape.

In closing argument, the prosecutor told the jury that Sarah Call's testimony at trial had been consistent with the videotape.

> And she tells somebody. And those people do the right thing. And it takes a long time before we get here, and her memory degrades, just like everybody else's does. <u>But there is a record, very early on. We made a video record of this. She is consistent</u>.

(R. 1325) (emphasis added).

The videotape was not in evidence. (R. 1325). The prosecutor clearly was attempting to bolster the credibility of the state's only witness, who had a suspect recollection of the incident, by telling the jury that Sarah's testimony at trial was consistent with a video record made early on. These remarks about matters not in evidence were improper.

Defendant's trial counsel objected to these remarks, moving for a mistrial. (R. 1325, 1370-73). The trial court denied the motion, finding that "there was nothing said

about what was in the tape or anything like that." (R. 1373). This finding is clearly erroneous. The prosecutor told the jury what was in the videotape. The prosecutor stated that the contents of the videotape were consistent with Sarah Call's trial testimony, thus telling the jury that the videotape contained the same facts heard at trial. Again, this is improper and constitutes prosecutorial misconduct. Palmer, 860 P.2d at 344.

As in Palmer, the prosecutor in this case made repeated remarks that were simply not supported by or in fact were contradicted by the evidence. Palmer also involved a man accused of sexual abuse of a minor. In that case, the prosecutor told the jury in closing argument that the defendant in that case had touched a young boy's genitals while the boy was sitting on the defendant's lap. There was no evidence of any abusive touching while the boy was sitting on the defendant's lap. Id. at 344. The prosecutor in Palmer also erroneously told the jury that the defendant had told the boy's mother about "seven different counts," thus evidencing "a consciousness of guilt." Id. at 345. In fact, the evidence contradicted the prosecutor's statements, as the defendant expressly denied ever mentioning the potential for seven charges to the mother. Id.. Finally, the prosecutor had stated that the court could take judicial notice of the existence and location of a hot tub business where the defendant allegedly touched the boy. In fact, there was no testimony regarding the business's address. The court held that this improper argument "could well have convinced the jury that the hot tub evidence was stronger than it actually was." Id. The appellate court reversed the conviction in Palmer, determining that these remarks by the prosecutor were improper, went to the heart of the issues in the case, constituted plain error, and were harmful to the defendant. Id.

Likewise, in this case, all of the improper remarks by the prosecutor went to the heart of the case, i.e., whether the defendant intentionally touched Sarah Call. As in Palmer, the improper comments of the prosecutor "could well have convinced the jury that the [state's

case] was stronger than it actually was." Id. In light of all the circumstances of this case, as set forth fully above, the prosecutor's improper remarks likely had an impact on the outcome of the trial. It was error for the court to deny the motion for a mistrial based on the improper remarks that were objected to by trial counsel. The other improper remarks were clearly contradictory to the evidence in the case, and constitute plain error that justifies reversal of the conviction.

B. The Prosecutor Improperly Remarked to the Jury that the Defendant Had Failed to Call His Son as a Witness.

In his closing argument, the prosecutor also referred to the fact that the defendant failed to call his son Peter Gollaher as a witness. (R. 1361). The defendant's trial counsel objected to this remark. (R. 1361). Under Utah law it is improper for a party to comment on the failure of the other party to call a particular witness, unless it is shown that the witness could have "elucidate[d] the transaction," and was "peculiarly within the adversary's power to produce." State v. Smith, 706 P.2d 1052, 1057 (Utah 1985). Comment by counsel as to absent witnesses is improper if these conditions necessary for comment are lacking. Id. at 1058.

The uncontroverted testimony at trial was that Peter Gollaher was asleep during the alleged touching. (R. 929, 1007). Consequently, it was not possible that Peter Gollaher's testimony could have "elucidated" the events on the trampoline and the prosecution could not satisfy the conditions necessary for it to comment on the defendant's failure to call Peter as a witness.

Under the "missing witness inference," if the defendant failed to call a certain witness, it can be inferred "that the testimony, if produced, would have been unfavorable." Id. at 1057. In this case, use of the "missing witness inference" was improper by the

prosecutor and prejudiced the defendant by allowing the jury to infer that Peter Gollaher's testimony at trial would have somehow been unfavorable to Gollaher. The prejudice of this comment was exacerbated by the fact that the prosecutor made the improper remark during his final closing remarks to which defendant had no opportunity to respond.

POINT IV

THE DEFENDANT WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY REASON OF HIS ATTORNEY'S FAILURE TO OBJECT TO THE IMPROPER REMARKS OF THE PROSECUTOR DURING CLOSING ARGUMENT AND TO THE INTRODUCTION OF EVIDENCE OF THE SUBSEQUENT HOT TUB INCIDENT.

The standard of review for ineffective assistance counsel under Strickland has been fully discussed above, supra at 36-37, and is hereby adopted by reference. The failure to object at trial "likely fails to meet the standard of reasonable representation, . . . thus satisfying the first prong of Strickland." State v. Callahan, 866 P.2d 590, 595 (Utah Ct. App. 1993) (dealing with a failure to object to questioning concerning a prior conviction). In this case, the defendant's trial counsel failed to object to the improper remarks of the prosecutor concerning the length of time of the touching on the trampoline and the remark that the defendant "remembered it was rubbing." (R. 1317) The defendant also failed to object to the introduction of the subsequent bad act evidence relating to the December 31, 1993 hot tub incident.[6]

As set forth in detail above, the weakness of the state's case, consisting of one witness with inherently suspect testimony based on her admission that she thought the incident

---

[6]As noted above, trial counsel did ask for and receive a bench conference at the time the State began to introduce the bad act evidence. (R. 910). However, because the conference was not recorded, there is no record of what occurred at that time. Even if trial counsel did object to the introduction of the bad act evidence at the bench conference, trial counsel erred in failing to make a record of the objection, thus precluding its consideration on appeal. State v. Olsen, 869 P.2d 1004, 1009 n.7.

was a dream, makes it reasonably probable that a different result would have occurred were it not for trial counsel's failure to object to the introduction of the bad act evidence and the improper remarks of the state during closing argument.

CONCLUSION

The trial court committed plain error by allowing extensive evidence regarding the subsequent bad act of the defendant in the hot tub on December 31, 1993. This bad act evidence was not necessary to establish the time frame in which the allegations were made, for that fact was undisputed. This "other crime, wrong or act" was not probative of any material issue of the crime charged and served no purpose other than to prejudice the defendant by presenting the implication that the defendant committed the crime charged because he is a likely person to do such acts. The defendant's trial counsel was ineffective by failing to object to the introduction of this evidence.

In addition, trial counsel was ineffective by reason of his failure to investigate and obtain a copy of the transcript of the television program that prompted Sarah Call's disclosure of the abuse, despite knowing the approximate date of the program and in the face of specific requests from the defendant. The transcript, showing a disturbing similarity to Sarah Call's testimony and describing the national acclaim and accolades received by the girl making the allegations in the television program, would have impacted the credibility of Sarah Call and provided a potential motive for the disclosure of the alleged abuse.

Finally, the improper remarks of the prosecutor during closing argument constitute prosecutorial misconduct. The defendant's trial counsel was ineffective in failing to object to the remarks of the prosecutor misstating the evidence, confusing the hot tub incident with the trampoline incident and stating that the defendant remembered rubbing Sarah Call.

Given the weakness of the state's case, the errors of the court, the misconduct of the prosecutor, and the ineffective assistance of counsel likely led to a different outcome at trial than would have resulted but for the errors and misconduct. For these reasons, the conviction of the defendant must be reversed.

DATED this 19th day of June, 1997.

PARRY LAWRENCE & WARD

By _____
BRENT D. WARD, Esq.
JAMES K. TRACY, Esq.
Attorneys for Defendant/Appellant
Scott Logan Gollaher

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLANT SCOTT LOGAN GOLLAHER, was hand-delivered this 20th day of June, 1997, to the following:

Christine F. Soltis
Assistant Attorney General
124 State Capitol
Salt Lake City, UT 84114

ADDENDUM

ABC NEWS 20/20 Transcript #1404

January 28, 1994

HUGH DOWNS, ABC News: Good evening. I'm Hugh Downs.

BARBARA WALTERS, ABC News: And I'm Barbara Walters and this is 20/20.

ANNOUNCER: From ABC News, around the world and into your home, the stories that touch your life, with Hugh Downs and Barbara Walters — this is 20/20.

Tonight, you'll meet an amazing young girl

DESIRAY BARTAK, Sexual Abuse Survivor: And there are so many kids that are out there being abused, and they need help.

ANNOUNCER: She was violated by a trusted adult, but overcame her fear.

DESIRAY: I was afraid that he would hurt someone in my family if I told.

ANNOUNCER: She took him to court, put him behind bars, then went public with her story.

DESIRAY: I felt that I had to do that for the other children.

ANNOUNCER: Tom Jarriel with a little girl you'll never forget, a champion for the silent victims of sexual abuse — "Making Him Pay."

And a dramatic race against time — infants like these won't survive without a new heart. The search for donors is under way. An anxious family waits.

DOMINICA PETERSEN, Mother: He's just one little guy and I love him.

ANNOUNCER: Then Hugh Downs takes you on a flight of hope and into the operating room for the critical transplant.

Dr. LEONARD BAILEY, Loma Linda University Medical Center: It's a miracle. It is an absolute miracle.

ANNOUNCER: A story of joy and tragedy: to save the life of one child, another must die — "A Gift From the Heart."

Plus, you saw Nancy Kerrigan right after the attack. Now follow the bizarre trail of the men charged with the crime.

GARY CROWE, Private Investigator: One man said, "Why don't we just kill her?"

ANNOUNCER: Police say they crisscrossed the country, stalking the victim, trading information and money. How did the plan unfold? How much did Tonya Harding know?

TONYA HARDING, Ice Skater: I had no prior knowledge of the planned assault on Nancy Kerrigan.

ANNOUNCER: Lynn Sherr traces the crime that shocked the country — "The Kerrigan Plot." These stories tonight, January 28 1994, after this brief message.

[Commercial break]

Making Him Pay

BARBARA WALTERS: Over the years, we have seen and heard of many trials of child abuse. In almost all of them, the children have not been identified publicly. In fact, that was the case just this week with Michael Jackson. His accuser settled out of court, never having revealed his n Tonight you're going to meet a young girl who was sexu abused and decided to speak out about it in a courageous and unprecedented way.

HUGH DOWNS: You know, this may be the first that a child has pursued her attacker with such determ tion, revealing not only his name, but her own, and h a well-known lawyer to make the case. Yet, she didn't there. As Tom Jarriel reports, she's now an inspiratio other victims like herself, to thousands of young pe who have been handling the pain of sexual abuse alone

TOM JARRIEL, ABC News: *(voice-over)* In her b pants, untucked shirt and sneakers, 13-yea Desiray Bartak looks every inch the '90s teenager; her life is in no way ordinary. Today she has flown her home in California to Chicago to appear on a tional TV talk show. A survivor of sexual abuse a 10, Desiray has gone on to turn her pain into a p crusade after emerging from a deep depression. message: when abused, children must speak up an remain silent.

DESIRAY BARTAK, Sexual Abuse Survivor: need to tell someone, 'cause if you don't it's going inside you forever and you're going to have that that's inside that you're not going to be able get rid

JARRIEL: *(voice-over)* To kids all across the cou she's a leader, a champion for children's rights. story began three summers ago when 10-yea Desiray was visiting her divorced father. As usual ing these summer visits, she would spend time wit godfather, Richard Streats, who had children Desir liked to play with.

DESIRAY: We were playing Nintendo and eating sandwiches and everything was fine.

JARRIEL: *(voice-over)* When did you know some was wrong?

DESIRAY: I had woken up to him massaging m molesting me.

JARRIEL: Did you cry out, or urge him to stop he try to explain what he was doing?

DESIRAY: No. I pretended like I was sleeping, 'c was too scared. And I was telling myself, "It's a d Don't believe it, it's a dream. It's not happenin seemed forever, and I never thought it was going t

JARRIEL: *(voice-over)* Desiray told us the next neither she nor her godfather spoke of the incident was confused and scared.

DESIRAY: I felt that if your godfather can do t you, who was supposed to love you and take care and you're supposed to trust him, then anyone can to you.

WAYANNE KRUGER, Mother: The moment th got back from her father's house, she went strai her room.

JARRIEL: *(voice-over)* Wayanne Kruger is De mom. The once-wonderful relationship wit daughter seemed to deteriorate overnight.

Mrs. KRUGER: She started fighting with us, yel

me a lot, yelling at her sister a lot.
DESIRAY: Even though me and my mom were so close, I didn't think that she would believe me because he was so close to the family, and I was afraid that he would hurt someone in my family if I told.
Mrs. KRUGER: Her grades went down immediately. I mean, right away, she lost concentration.
DESIRAY: I went into a huge depression where I was wearing all black.
Mrs. KRUGER: Almost like she was concealing herself.
DESIRAY: I wouldn't sleep and if I did, I'd have horrific nightmares.
Mrs. KRUGER: She always kept her bedroom door closed. I mean, there were so many signs that she had been sexually abused that it was unbelievable.
JARRIEL: *(voice-over)* Ironically, Waysnne too had been molested as a child. She told Desiray because she suspected that Desiray
might have also been abused.
Mrs. KRUGER: And even after telling her my story, she would just go into a blank.
DESIRAY: I didn't feel that I should live my life anymore because it was over. There was nothing left for me to do.
Mrs. KRUGER: And she said, "Mom, I want to kill myself." That was— and I just— I was beside myself. I mean, I couldn't believe that my 11— 10-year-old — I think she was 10 at the time — said, "I want to kill myself."
JARRIEL: You really felt life wasn't worth it anymore, huh?
DESIRAY: It wasn't.
JARRIEL: *(voice-over)* She went into therapy to work on her problem and seemed to improve, but when the next summer vacation came around, once again she was to spend time in the home of her godfather, Richard Streate, who now had moved to this home in southern California.
DESIRAY: He opened the door and I saw the look on his face. I felt like 10 million pounds of bricks just hit me and just fell right on my shoulders. And I was crying for my dad not to leave, 'cause I didn't want him to leave, but I didn't tell him why. And that night, he approached me and tried to again.
JARRIEL: The same thing again?
DESIRAY: Yes.
JARRIEL: Attempted. What stopped him?
DESIRAY: I had the covers tightly tucked underneath me, and I was tossing and turning so he couldn't get in.
JARRIEL: After this second time, when he attempted, but didn't reach you, you decide to speak out. Who did you tell first and what was the reaction?
DESIRAY: Well, the next morning, I called my biological father and I was crying. My dad had always said that whatever happens, he'll always believe me and I'm his little girl, but that's not the action that he took.
JARRIEL: You told him the man he trusted — his best friend, your godfather — had attempted to molest you.
DESIRAY: I can say specifically what he told m
that was that he doesn't believe me because he t
was making it up for the attention.
Mrs. KRUGER: And I was trying to calm her
"Desiray, what happened?" And she got really q
mean, her tears stopped. She just got silent. And
"Did somebody hurt you?" And she mumbled,
And the first thing after that, I said, "Did Richard
you?" I knew it. I knew it. I could just— I felt it in
part of my soul that that's what happened. I me
erything came back to me. And she said yes.
JARRIEL: *(voice-over)* Waysnne had finally disc
the cause of Desiray's year-long depression. To
they decided to go to the police. If it had happe
Desiray, it had happened to others, and th
Richard Streate needed to be stopped.
(on camera) Here in Simi Valley, the little girl
plaint reached the desk of sheriff's investigators
effort to get more evidence, they had Desiray
Streate and confront him about the abuse while t
corded the conversation, however, this ploy didn'
In a 45-minute call, Streate admitted nothing. I
have ended there, but nine months later there
other development which finally broke the ca
open — when another girl, aged 10, came for
complain she too had been molested repeatedly
three-year period by Streate.
(voice-over) In a detailed report to the auth
she complained Streate "repeatedly fondled her
and vaginal area with his hands." Now, with th
plaints against him, Streate confessed. Detect
Lewis, who worked on the investigation, belie
second little girl would have never come forw
Desiray not first paved the way.
Det. SUSAN LEWIS, Simi Valley Sheriff's
She has a real sense of what's right and even t
explained to her at the time that she was goi
going through a series of interviews, that she w
to be going to court, she could possibly be si
court on the witness stand in front of the perpe
the courtroom, she was undaunted by that.
JARRIEL: *(voice-over)* Detective Lewis says h
sees over 2,000 sex abuse complaints a year,
than half ever reach the courts because the chil
too afraid to speak up. And not only did Desir
up, she spoke out, allowing the courts and the
reveal her identity. Thus she broke the traditio
parents and children follow to hide their id
avoid the stigma of having been abused.
DESIRAY: I felt that I had to do that for the ot
dren, 'cause I know that there were tons just
that are out there that weren't talking.
Mrs. KRUGER: I never knew another child
done it. She would change the world; She'd be
child, the first girl in the nation that I knew
would say, "I was molested and this is my real
JARRIEL: *(voice-over)* And Desiray pursued
with a vengeance. She wrote an impassioned
top feminist lawyer, Gloria Allred, and won h

thies and her services, and on January 12, 1993, the case went to criminal court. It was the first time Desiray had seen Richard Streate since the abuse. Ms. Allred read for us the statement she made in court that day.

GLORIA ALLRED, Attorney: "It is night. It is dark. There is silence. The child is sleeping. Suddenly, there is a large man by her bedside. He leans over her. What is more vulnerable than a sleeping child? He places his fingers inside of her. He moves them around, not just once but continually for 10 minutes. It was 10 minutes of horror in the dark and in silence, inflicted by a man much bigger than a 10-year-old girl. And I ask the court to look at this through the eyes of a child."

DESIRAY: "I hate him for touching me. I hate him for what he has done to my life. I will never forgive him and I will never forget what he has done to me."

JUDGE: Defendant is sentenced to the low term of three years in state prison.

JARRIEL: *(voice-over)* Richard Streate got three years and Desiray had had her day in criminal court, but she wasn't finished. In what's believed to be an unprecedented legal move by a youngster, she attacked Streate through a civil lawsuit, seeking compensation for the physical and emotional damages she had suffered.

DESIRAY: I knew that you have to do something big to get somewhere in life, and what I would like to see coming through this lawsuit is more kids coming forward about it. And I want them to know they can do this.

Ms. ALLRED: Desiray is a pioneer, very courageous. Generally, children have been thought to be people who should be in hiding about the abuse that they suffer, to be ashamed, and that is what Desiray has turned upside down. She has indicated that she doesn't feel ashamed. Why should she? She is not the wrongdoer, she's not the perpetrator. She is the innocent victim.

JARRIEL: *(voice-over)* And that's a big part of the message Desiray's trying to spread to children all over the country. To help her, she and her mom have started an organization called CARAM — Children Against Rape and Molestation. She writes a newsletter that's distributed to victims' rights organizations and police stations to let children of abuse know they are not alone. Her mailbox has been filled with letters from abused children who, for the first time, have someone to turn to.

DESIRAY: "When I was little, I was molested by a family member about two years ago. I told someone about it. Sometimes I feel like that person is going to hurt me."

JARRIEL: This is a complicated problem for a lot of kids. What advice do you tell them?

DESIRAY: Well, if they have already been through the abuse, I tell them that I think they should file a police report and I think that if no one listens to them, they should keep on telling until someone will listen to them.

JILL WEBB, Friend: It got to a point where I was ready to give up, but then Desiray came along and it changed my mind and made me want to go on.

JARRIEL: *(voice-over)* Closer to home, Jill Webb, friend of Desiray's from school. It was only after hearing about Desiray going public that she too decided talk about her own abuse.

(interviewing) When you were molested, did you have somewhere to turn? Did you have someone to speak to about it?

JILL: No. I was so scared that he might hurt me or of my family that I just kept it inside and had now to go.

JARRIEL: Have you been shocked, have you been pri[sed] to learn that you're not alone, even though you felt terribly alone in trying to deal with this?

DESIRAY: I was surprised, but I wasn't shocked. I mean, the statistics are just horrific, and there are so many kids that out there being abused and they need help.

"Dear Desiray, I bet you feel the same way as I do. I can't believe my grandpa did this to me. I wish I could punch him for the nasty things he did."

"Hi, Desiray. I was sexually abused when I was [7] years old. It was by my babysitter's husband."

"Dear Desiray, I'm proud of you. I feel like you know and understand."

"Dear Desiray, I was abused by my mommy and daddy and friends and sister."

"Desiray, I love you."

Det. LEWIS: I think children need to be empowered. They need to tell anyone who will listen about what's happening. And in Desiray's case, she did that and she was listened to and I think that's worked out very good for her.

JARRIEL: *(voice-over)* And just this month, Desiray's lawsuit was settled in California civil court. The jury ruled in Desiray's favor, awarding her over $2 million in damages. Richard Streate was not present in the courtroom, but through his attorney he wanted it known on the record that he too was a victim; and had been sexually abused as a child. For Desiray, this landmark legal decision marked the end of a very difficult chapter in which she lost her childhood, but found inner strength and a voice for abused children everywhere.

REPORTER: Desiray, how are you feeling right now?

DESIRAY: Happy.

WALTERS: Of course, she probably will never get a million. He doesn't have that kind of money.

JARRIEL: No, he doesn't have it. It's a victory on principle, primarily.

WALTERS: But does Desiray feel, then, that all children should be open about it?

JARRIEL: Barbara, it's an individual decision. Anyone knows it is, because it can be so damaging to a child to come out and do this publicly. It is something each family has to choose individually with their parents.

WALTERS: Has it been at all damaging to Desiray?

JARRIEL: Oh, she has gone through a terrible ordeal. In her school, for example, the kids ostracized her.

WALTERS: Really?
JARRIEL: They chased her home in a threatening fashion. She had to take home studies and drop out of public school because they knew that she had been involved in this.
WALTERS: Criticizing her.
JARRIEL: And they accused her of leading him on and nasty things like that that were so untrue.
WALTERS: And what about her relationship with her father?
JARRIEL: It's been broken for over a year. Remember, it was his best friend and he sided with the godfather at one point, so it's a very, very difficult situation.
WALTERS: So it was very brave of her to do this.
JARRIEL: Definitely.
DOWNS: Well, next on the program, a lifesaving effort like you've never seen before —

[voice-over] —a medical team that joins forces to give this infant a new heart. I'll take you on a search for a donor and into the operating room with a world-famous transplant surgeon. You'll witness joy and anguish and an amazing ending.
[Commercial break]

A Gift From the Heart

HUGH DOWNS: I'm about to take you on a remarkable medical journey to save a newborn boy. It's an odyssey fraught with risk and emotion and perhaps controversy over how far we should go to save an infant's life. Tonight you'll be part of the incredible process of heart transplant surgery, and you'll experience a family's anxiety, the urgent search for a donor and the wonder of this very precise procedure.

[voice-over] And for the first time, you'll witness the transfer of life from one child to another.

The birth of Austin Petersen last August 2rd — the beginning of a voyage his parents Dominica and Kent know will be a rough one.

KENT PETERSEN, Father: It's Daddy, son. What are they doing to you?

DOWNS: *[voice-over]* Their son has a condition that's almost always fatal. It was four months before that the Petersens had first learned something was wrong with their baby at a routine office visit.

DOMINICA PETERSEN, Mother: We had the sonogram at, I think, 1:30 and at 3 o'clock, they called me at home and said, "We only see three chambers in the heart." And that's when they dropped the bomb, basically, and we were pretty nervous.

DOWNS: *[voice-over]* A few days later, doctors confirmed the worst. A large part of the right side of Austin's heart was virtually nonexistent, a condition known as hypoplastic right heart syndrome.

Mrs. PETERSEN: We couldn't have abortion because we had watched him so many times on the monitors of the sonogram and I.e was so alive that we just couldn't do anything like that. So we were just going to have him and take it one day at a time.

DOWNS: *[voice-over]* But the Petersens did hav realistic alternative — to give their child a transplant — so they came here to Loma Linda a chief of surgery, Dr. Leonard Bailey.

[on camera] This is one of the surgical suites Loma Linda University Medical Center, abou hours east of Los Angeles. It's here over the past s years that Dr. Bailey and his team have been perf the art of implanting the working hearts of ch who have died into the bodies of children who w without this surgery. The surgery is complicate long and has often been done on infants just hou And in many cases, the hearts Dr. Bailey work are really tiny, weighing no more than a regul velope, and although the surgery is lifesaving, also at times been controversial.

RITA FLYNN, Newscaster: It has never bee before, not successfully and not on a pati small.

DOWNS: *[voice-over]* The announcement th Bailey had transplanted the heart of baby baboo dying child made headlines back in 1984. "Bab as she became known, died after 20 days, but n the transplant — she had other complications — Bailey, it was worth it.

Dr. LEONARD BAILEY, Loma Linda Uni Medical Center: She sort of announced to th that, "Hey, look out, babies need transplants, to notice, folks, and baby organs can be used."

DOWNS: *[voice-over]* So a year later, he did transplant. This time, he put a human heart int born baby. Eddie Aguirre was the patient. T eight years ago. This is Eddie today, the oldest ing infant heart transplant patient. Because h such poor medical condition before the transpla problems linger today. His coordination is poo has problems with speech, but with a little p from his mom, he can tell you what Bailey did f

Mrs. MARIA AGUIRRE, Mother: He took bad heart and then what else did he do?

EDDIE AGUIRRE, Heart Transplant Surv a new one in.

DOWNS: Put a new one in.

Mrs. AGUIRRE: Put a new one in and you now.

DOWNS: Pretty good. Not too many get to placement like that, so that does make you ape

[voice-over] Eddie was just the first. In the eight years, there were many more babies hearts, and this picture tells it all. There are to 175 infants with a second chance. And whil tors wait for hearts, more babies are born defects. It's estimated that thousands of babie with underdeveloped or badly developed h year. While some can be cured with co surgery, others will died without a transplar side of young Brandon's heart is drastically and he's been waiting for a heart for two mon

Dr. BAILEY: This baby has absolutely no ho